85-2035

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HOWARD SIEGER,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SALVATORE S. RUSSO
215 Hilton Avenue
Hempstead, New York 11550
(516) 538-2334

Counsel for Petitioner

108pp

QUESTIONS PRESENTED

1. Whether a conviction for conspiracy to receive stolen property may be sustained where the property, in fact, is not stolen.

2. Whether the due process clause of the Fifth Amendment to the United States Constitution permits criminal prosecution where Federal authorities arranged for the creation of the "stolen property", created the necessary jurisdictional prerequisite of interstate commerce and induced Petitioner to continue with the conspiracy despite his desire to withdraw.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1986

HOWARD SIEGER,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Howard Sieger, respectfully requests that a writ of certitorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding March 13, 1986.

The opinion of the United States Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix to this petition. The opinion of the United States District Court for the Southern District of New York, dated , is not reported and also appears in the Appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 13, 1986. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Title 18 United States Code, Section 2315:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000.00 or more, ... which are a part of, or constitute interstate or foreign commerce, knowing the same have been stolen, and unlawfully converted, or taken....[s]hall be fined not more than $10,000.00 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

By indictment SS 84 Cr. 158 (CSH) The United States of America charged the Petitioner, Sieger, along with Richard

Folch, Isaac Zabare, a/k/a, "The Rabbi", Mozelle Brown and Adolph Lindsay with unlawfully, wilfully and knowingly conspiring together and with each other to commit a violation of Title 18, United States Code, Section 2315. The indictment alleged that the purpose of the conspiracy was the receipt of "stolen" Ticketron tickets.

Defendant, Richard Folch pleaded guilty immediately before trial to the crime as charged in the indictment. The remaining defendants, including Petitioner, waived their right to a jury trial, and the trial commenced immediately thereafter. Defendant, Sieger was convicted as charged and defendants, Brown and Lindsay acquitted. Defendant, Sieger was sentenced to five years probation.

The investigation culminating in the indictment and conviction of Petitioner began in the summer of 1983 when an informant, Randy Rosenthal, called Richard Folch and told Folch that Rosenthal had a method for obtaining Ticketron tickets which were blank. On July 20, 1983 FBI Special Agent, Dale Hackbart met with defendant, Richard Folch, Raymond Rosenthal the informant, and Special Agent, Stuart Sturm. Hackbart informed Folch that Hackbart had blank Ticketron tickets to sell to Folch. Folch followed the instructions of Rosenthal by expressing enthusiasm for the arrangement and representing that he had the capability to take an unlimited amount of tickets for distribution.

After the meeting, Folch contacted Petitioner and informed petitioner that Folch had a way of obtaining blank Ticke-

tron tickets. Meanwhile, Hackbart arranged with Ticketron for the printing of blank tickets from Ticketron at their premises located in Maryland. Hackbart testified that he received these blank tickets on July 22, 1983 at Newark International Airport.

On July 25, 1983, Rosenthal, Hackbart and Folch met once again in New York. Hackbart testified at the trial that Folch had scheduled a series of meetings where Hackbart was to supply the tickets to Folch to be sold to Folch's customers. One of Folch's customers was to meet Rosenthal, Folch and Hackbart at a Blimpie's restaurant located at 30th Street and 7th Avenue in New York City. At this meeting, Hackbart informed Folch that Hackbart had the tickets presently available. Folch paid Hackbart $1,000.00 U.S.C. As the group waited for one of

Folch's customers, Folch made a series of telephone calls. He also left the restaurant to look for the customer, supposing that the customer might have lost his way. He returned informing Hackbart that Folch had located someone else who would purchase some of the Ticketron tickets. Shortly thereafter, the co-defendants, Brown and Lindsay, allegedly purchased a stack of blank tickets from Hackbart and Folch.

After the Lindsay and Brown purchase Folch, Rosenthal and Hackbart returned to, the restaurant. Folch once again left to look for the customer and returned in an excited state because he had heard that Brown and Lindsay were arrested. At this point, Agent Hackbart reassured Folch about the entire transaction. The trio left the restaurant and proceeded to 99 Wilson Street where the co-conspirator,

Isaac Zabare, resided. After an alleged sale to Zabare, the trio proceeded to West 90th Street in Manhattan. At the location of 180 West 93rd Street, Petitioner met with Folch, Rosenthal and Hackbart. Significantly, Sieger voiced concern that the tickets were no good, that the tickets would be reported stolen, and that all of them would wind up in trouble. Agent Hackbart testified that Agent Hackbart assured Sieger that there would be no problem with these tickets. After continued discussion about the viability of the entire transaction, Hackbart succeeded in assuring Sieger that the enterprise would be successful.

Folch then directed Hackbart to give Sieger 2,000 tickets. Hackbart ultimately turned over to Sieger 2,400 tickets.

After the transaction had been completed, Sieger and Folch were arrested.

While in custody, Sieger made a statement to Agent Sturm in which he admitted that he had received a telephone call from Folch on July 25th. Sieger admitted that he was given the blank Ticketron tickets in front of his residence and that he had previously scalped tickets.

The District Court convicted Petitioner, rejecting his assertion that the government was required to prove beyond a reasonable doubt the same degree of knowledge for a conspiracy count as would be required to convict a defendant for the substative count of receiving stolen property in violation of Title 18, United States Code, Section 2315. The District Court also rejected Petitioner's argument that Federal authorities had

themselves created the necessary jurisdictional prerequisite of interstate commerce to proceed with prosecution in thsi case by their arrangement to transfer the Ticketron tickets from its printing plant in Maryland to New York. The Court below stated in its opinion that it saw "nothing reprehensible" in the agent's direction to Ticketron to manufacture and transport these tickets to the northeast. In part, the Court supported its position by stating that Folch had previously requested a sizable quantity of blank tickets for illicit purposes. However, the record below demonstrably states that it was the informant who convinced Folch to participate in the conspiracy before Folch ever made any request for any action on the part of the agents.

Petitioner appealed to the Court of Appeals for the Second Circuit which affirmed the judgment of the District Court in a non-published decision entered on March 13, 1986. The Court of Appeals decision relied upon its prior holding in United States v. Giordano, 693 F.2d 245, 249 (1982). It also cited United States v. Rose, 590 F.2d 232, 235 (7th Cir. 1978) to sustain the conviction.

With regard to Petitioner's claims that the agents in this case needlessly generated Federal jurisdiction, the Second Circuit relied upon the general proposition that a scheme to obtain the tickets from the manufacturer by its nature involved interstate commerce.

REASONS FOR GRANTING THE WRIT

I. The decision below creates a conflict among the Federal Courts of Appeal, and between state and Federal Courts, as to whether a conviction for conspiracy to receive stolen property can be sustained where the property, in fact, is not stolen.

In United States v. Feola, 420 U.S. 671, 686 (1975), this Honorable Court stated that:

> "Our decisions establish that in order to sustain a judgment of conviction on a charge of conspiracy to violate a Federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself."

This statement has given rise to diversions of opinion in its application to cases dealing with conspiracy to commit a violation of Title 18, United States Code, Section 2315. Compare United States v. Monasterski, 567 F.2d 677 (6th Cir. 1977) and Lubin v. United

States, 313 F.2d 419 (9th Cir. 1963) with the decision of the Second Circuit in this case. In Monasterski, the 6th Circuit convincingly interpreted the knowledge requirement of Section 2315. By reference to the common law as well as basic rules of statutory construction, the Court held that it is an essential element to Section 2315 that the defendants knowingly possessed stolen property. If an individual comes into possession of property with the permission of the owner, he cannot be convicted as a matter of law of the crime of criminal possession of stolen property even if he believed the property had been stolen.

The Second Circuit has taken the view that a defendant can be liable for a conspiracy to commit a violation of Section 2315 even if the requisite mental

state as articulated by the statute cannot be proven. The position of the Second Circuit creates serious questions with regard to law enforcement. The Second Circuit implicitly adopted the Government's position in this case that a person's belief that property is stolen is sufficient to sustain a conviction for conspiracy to violate the statute. As happened in this case, the Government is empowered to supply the element of knowledge by merely informing the target of an investigation that property is stolen. Rather than proving beyond a reasonable doubt that a defendant has actual knowledge that property is stolen, the Government may merely prove by the testimony of its own agent that the defendant was under a mistaken belief that the property was stolen. This

hardly seems like wise policy.

This honorable Court should grant the petition for certiorari in this case so that the extent of the application of the theory of legal impossibility may be finally determined. In addition, this Court may then clarify the meaning of its decision in the United States v. Feola, supra, as it applies to violations of Section 2315 of Title 18 and conspiracies to commit that offense. This Court should grant the writ of certiorari to review the judgment below and resolve the conflict.

II. THE "OUTRAGEOUS CONDUCT" STANDARD ARTICULATED BY THIS HONORABLE COURT IN HAMPTON V. UNITED STATES HAS CREATED A DIVISION AMONG THE CIRCUITS IN ITS APPLICATION. A REVIEW AND CLARIFICATION OF THE STANDARD IS REQUIRED BY THIS COURT.

In Hampton v. The United States, 425 U.S. 484 (1976) a majority of this Court recognized that either the due process clause of the Fifth Amendment or the Court's supervisory power over the Federal judiciary provided limits on the conduct of the police where their conduct was so outrageous as to warrant a refusal to exercise jurisdiction over a particular matter.

The 9th Circuit has recently reviewed this area, and demonstrated the clash among the circuits in defining and articulating the "outrageous conduct" defense. United States v. Bogart, 783

F.2d 1428 (1986). The Court therein stated that:

> "A number of Courts have read Supreme Court precedent to confine the broad due process check on the conduct of law enforcement officers only to that slim category of cases in which the police had been brutal, employing physical or psychological coercion against the defendant. Id. at 1435. See, United States v. Kelly, 707 F.2d 1460, 1476, Note 13 (D.C. Circuit 1983) (per curiam) (citing cases).
>
> On the other hand, the Second, Third and Ninth Circuits have clearly held that conduct falling short of coercion, may be so aggregious as to warrant a dismissal on due process or related grounds. See United States v. Archer, 486 F.2d 670 (2d. Circuit 1973); United States v. Twig, 588 F.2d 373 (3rd Cir. 1978); United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986)."

This case presents an appropriate set of facts for the Court to clarify the due process standard to which a majority of the Court has adhered. The undisputed evidence at the trial established that Federal authorities arranged for the cre-

ation of the "stolen property" by contacting the manufacturer of the tickets and requesting that the tickets be printed. To create the necessary jurisdictional prerequisite of interstate commerce, the Federal agents arranged the transfer of the tickets from the printing plant in Maryland to New York.

The informant in this case initiated contact with a co-conspirator, Richard Folch and informed Folch of the potential for distributing the tickets. The informant then set up a meeting with Federal agents and Folch. At the meeting, the agents presented Folch with their idea and a subsequent meeting was arranged. At this second meeting, a customer for the tickets failed to appear and Folch arranged the purchase by two other individuals, Lindsay and Brown, named as co-defendants in this case who

were ultimately acquitted at trial. After this meeting concluded, Folch and the agents met with the Petitioner outside of his residence. Petitioner voiced concern that the tickets were no good, that the tickets would be reported stolen and that all of them would wind up in trouble. The FBI agent assured the Petitioner that there would be a minimum of problems with the tickets and that the tickets had already been picked up by the agent. The agent induced the Petitioner to continue in the conspiracy, even after Petitioner indicated his desire not to participate. In a statement given to law enforcement authorities after his arrest, the Petitioner stated that this was the first time he had dealt in Ticketron blanks and admitted that he usually makes his living from scalping legitimate tickets to concerts and events. Prior to

the instant offense, Petitioner had never been convicted of a felony.

As in the case of United States v. Twig, supra, 588 F.2d 373, the agents set Petitioner up, encouraged him to participate in this conspiracy, provided him with the essential tools for the conspiracy to continue, and when Petitioner expressed a desire to withdraw, the agent persuaded him to continue.

This type of conduct on the part of law enforcement authorities is particularly reprehensible when the alleged crime defendant supposedly commited is considered. This was no major narcotics operation, no major arson conspiracy, no concerted racketeering effort. Petitioner admitted to being a "ticket scalper" who made his living by selling tickets to individual concert

goers. If the propriety of investigative techniques is to be measured by the evil sought to be deterred, then surely the techniques in this case did not pass Constitutional muster. It is respectfully submitted that the Court should address itself to the question whether Federal intervention is appropriate under the circumstances presented in this case. Should an individual be confronted with a criminal conviction under circumstances where Federal authorities not only induced the defendant to participate, but create the property itself which is alleged to have been stolen, and provide the interstate elements in order for Federal jurisdiction to be exercised. A line needs to be drawn somewhere and law enforcement authorities advised that activities with a deminimis effect of

interstate commerce which are created by Federal authorities will not be found acceptable by the United States Courts.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

-against-

HOWARD SIEGER,
a/k/a "Cyclops,"
MOZELLE BROWN, and
ADOLPH LINDSAY,
Defendants.
----------X

SS84 Cr.188-
CSH
MEMORANDUM
OPINION AND
ORDER

APPEARANCES:

RUDOLPH W. GIULIANI
United States Attorney for
the Southern District of
New York
One St. Andrew's Plaza
New York, New York 10007
Kenneth A. Caruso, Esq.
Assistant U.S. Attorney
Of Counsel.

PAUL T. KOTCH, ESQ.
Attorney for Defendant Seiger
217 Broadway
New York, New York 10007
Salvatore S. Russo, Esq.
1415 Kellum Place
Garden City, New York 11530
Of Counsel.

CAESAR D. CIRIGLIANO, ESQ.
The Legal Aid Society
Federal Defender Services Unit
Attorney for Defendant Brown
2 Lafayette Street, Suite 510
New York, New York 10007
David Gordon, Esq.
Of Counsel.

DAVID COOPER, ESQ.
Attorney for Defendant
Lindsay
401 Broadway
New York, New York 10015

HAIGHT, District Judge:

In this criminal case, a one-count second superseding indictment charged five individuals with violating 18 U.S.C. §371 by conspiring to violate the provisions of 18 U.S.C. §2315. 18 U.S.C. §2315 provides in pertinent part:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more,... moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken;...(s)hall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The indictment named the following five individuals as conspirators: Richard Folch; Isaac Zabare; Howard Sieger; Mozelle Brown; and Adolph Lindsay. Prior to trial Zabare was severed from the case for psychiatric

evaluation, with a view toward possible deferred prosecution. The case against him still pends. Folch pleaded guilty. The trial went forward against defendants Sieger, Brown and Lindsay. Each of these defendants waived jury trial in writing, with the approval of the Court and the consent of the Government. Rule 23(a), F.R.Crim.P. The following constitutes the Court's findings of fact and verdict. Rule 23(c).

FINDINGS OF FACT

In July 1983, agents of the Federal Bureau of Investigation in the New York City area were participating in an investigation of the sale and use of counterfeit and stolen amusement tickets. Dale Hackbart, who testified at trial, was one of the special agents thus engaged.

On July 20, 1983, an informant, Raymond Rosenthal, set up a meeting at the offices of Ticketron in Manhattan. Ticketron, a division of Control Data Corporation, is in the business of printing tickets for sporting events, entertainment, and travel. Ticketron contracts with the promoter or producer of the event (a baseball team, a concert hall manager, and the like) to print and furnish the tickets for a given event or events. The sale and use of counterfeit and stolen tickets poses a recurring problem for Ticketron and other members of the sports and entertainment industries.

Attending the July 20, 1983 meeting were the informer, Rosenthal; Hackbart, acting in undercover capacity with the assumed name "Paul Watson"; FBI special agent Stewart Sturm, also undercover and using the name "Stewart

Singer"; and defendant Richard Folch. Agent Sturm was pretending to be a corrupt Ticketron employee. Hackbart was impersonating a "wheeler-dealer," who had the capacity to bring parties together in an illicit enterprise. Folch had indicated an interest to obtain blank Ticketron tickets, in order to resell them in their blank state at a profit, or have the blank tickets printed up for a particular concert or event prior to resale. The end product of the process is, of course, counterfeit tickets; if Folch sold the tickets blank, someone else would do the counterfeiting, whereas if Folch attended to the printing he was also the counterfeiter.

The July 20 meeting began in the Ticketron offices, but the participants then moved to a nearby restaurant. Hackbart was wearing a recording device.

The tape was played at trial and a transcript was received as GX 1B. During the conversation, Folch declared his intention to resell the tickets to "people that I'm dealing with on the West Coast." Transcript ("Tr.") at 3. Hackbart reassured Folch that the Ticketron blanks would not be "hot or stolen tickets," and made reference to shipments of blanks coming in from "the printer down in Hagerstown." Tr. at 3, 4. This was a reference to the Arnold Graphic Company, located in Hagerstown, Maryland, and according to the trial testimony of Robert Reers, its vice-president, which I accept, the sole manufacturer of tickets to Ticketron for the latter's sports and entertainment division. The July 20 conversation involving Folch also dealt with the amounts of blank Ticketron tickets that

Folch wished to purchase for resale, and the prices at which the transactions would take place.

On the subject of price, Folch initially offered Hackbart 50 cents a ticket. GX 1B at 4-5. This is the price used for subsequent transactions; see p. 8 infra. Folch also discussed with the agents the economics of marking up the Ticketron blanks, once they had been printed:

> "HACKBART: Give us a chance (UI) now we know what you want. We know how many you want. We didn't know before. I thought we were talkin' a thousand, 2 thousand. Ray and I discussed it but
>
> "FOLCH: A thousand, 2 thousand, would be ah something like you fellas would be talking about. Taking them running to a printer, getting them printed in the original ticket for a show, printing up a thousant seats and selling them to 6 or 8 black guys that sell them for 15-20 dollars each and you charged them 8 dollars each."
>
> Id. at 14.

The meeting concluded and the participants took leave of each other. Hackbart then conferred with Joseph Rafalowicz, Ticketron's general counsel, concerning the possibility of obtaining blank Ticketron tickets for sale to Folch. After consulting his superiors, Rafalowicz made arrangements for the printing in Hagerstown of the blank tickets. On July 22, 1983, Hackbart went to Newark Airport for the purpose of taking delivery of three boxes of blank tickets which had been air freighted up from Hagerstown. Hackbart brought the tickets into Manhattan.

The tickets were packaged in sealed bundles of 800 blank tickets each. The top and bottom tickets of each bundle, visible through the sealing material, were normal blanks. The other 798 tickets were prominantly marked "Test

Ticket,""Not for Sale," and "Void." Those markings could not be seen until the bundle was opened.

The next pertinent events took place during the late morning of July 25. Hackbart, Rosenthal and Folch met at a Blimpie's restaurant on Seventh Avenue and the thirties, in the vicinity of Madison Square Garden. The three men had a noon appointment to meet one of Folch's customers for blank Ticketron tickets. Folch told Hackbart and Rosenthal that Folch had scheduled a number of meetings for that day; one of his customers was to meet them at the Blimpie's restaurant; and Folch was relying upon Hackbart and Rosenthal to furnish him with the blank tickets to be resold to these customers. Hackbart told Folch that he had tickets available. Folch gave Hackbart $1,000,

stating that the payment reflected his "good faith" for the contemplated transactions.

Fold told the others that the individual he was waiting for at the Blimpie's restaurant was one Bill Wear, also known as "Tonto." Folch said he was from California, and that Folch intended to resell some of the tickets to Wear. But Wear did not arrive. Folch made a number of phone calls, and then, according to Hackbart's testimony, "went up the street" looking for Mr. Wear, figuring possibly he had gotten lost. Tr. 50.

Hackbart's testimony of what happened next is crucial to resolution of the case, and accordingly I quote his direct evidence at some length.

Hackbart testified concerning Folch:

"He came back with--he came back and said that he had found someone else who was interested in buying some tickets, would I be interested in selling a package, meaning one bundle of 800, to other individuals, and I agreed. I said, 'Sure.'

"Q. What happened next?"

"A. He brought down two individuals. We walked up the street towards Madison Square Garden. He said, 'Wait over here a minute while I negotiate,' words to that effect.

"He talked to one of the individuals."

Tr. 50-51.

Hackbart identified the two individuals in question as defendants Brown and Lindsay.

Hackbart's testimony continued:

"THE COURT: The time came when Mr. Folch--

"The WITNESS: Came down the street--

"THE COURT: Yes, go ahead.

"THE WITNESS: With two individuals, talked briefly to Mr. Lindsay, talked briefly to Mr. Brown. I came over, Mr. Rosenthal came over. He said, 'These are the fellows who are going to buy the tickets.'

"Q. Who said that?

"A. Mr. Folch.

"Q. Continue.

"A. Fine.

"Then Mr. Folch, Mr. Brown walked away. Mr. Lindsay stood next to a post, talked to Mr. Rosenthal briefly. I went back to the car and picked up a package of tickets, came back and waited for the transaction to conclude.

"Q. Then what happened next?

"A. Some brief point after that Mr. Folch said, 'Here is $400. Give Mr. Brown a package of tickets,' which I did.

"Q. Did Folch give you $400?

"A. Yes, sir, he did.

"Q. Did you give Folch a package of tickets?

"A. I gave the tickets directly to Mr. Brown."

* * *

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"Q. Did Folch give you $400?

"A. Yes, sir, he did.

"Q. Did you give Folch a package of tickets?

"A. I gave the tickets directly to Mr. Brown."

* * *

anything about the arrest. In point of fact, Hackbart called the FBI office to tell them where he was. Hackbart then returned to the car, and told Folch that he had spoken to "Stewart," who indicated that the arrests were probably made by Ticketron employees working with the New York City Police Department officers in the Madison Square Garden area because there was a concert that night. Hackbart told Folch that "Stewart" would check on the matter further and get back to him. Folch was somewhat reassured.

Folch, Hackbart and Rosenthal then drove to an address at 99 Wilson Street in Brooklyn. This Brooklyn address was that of Isaac Zabare, named as co-defendant in the indictment, whose nickname was "The Rabbi." Folch told Hackbart and Rosenthal that he had

agreed to sell 6,400 blank tickets to Zabare. Hackbart, remaining in the car, gave Folch 3,200 tickets. Rosenthal and Folch entered the apartment building. Folch thereafter came out again, and gave Hackbart $3,200 in cash. That sum represented payment for the 6,400 ticket order, at the agreed price of 50 cents per ticket. Hackbart gave Folch 3,200 more tickets. Folch re-entered the building; shortly therafter he and Rosenthal exited from it, and Rosenthal, Folch and Hackbart returned in the car to Manhattan. Surveillance agents were observing these events in Brooklyn. Zabare was arrested by FBI special agent Lawrence Reinfeld.

Having returned to Manhattan, Folch asked that the car be stopped in

the vicinity of West 90th Street. Folch left the car to make a telephone call, and said upon his return to the car that "Cyclops" would meet them in front of his apartment building at 180 West 93rd Street. "Cyclops" is a nickname for defendant Sieger.

The car proceeded to that address. Hackbart, Folch and Rosenthal met Sieger in front of the apartment building. According to Hackbart's testimony, Folch introduced Sieger to Hackbart and Rosenthal. Sieger and Folch walked away a short distance, had a brief discussion, and then returned. A four-way conversation then ensued involving Sieger, Folch, Rosenthal, and Hackbart. Sieger had heard of the arrests that morning of Lindsay and Brown. He expressed concern "that the tickets were no good, that they would

be on a hot sheet reported stolen, that we would all be in trouble." Tr. 73. Again, Hackbart and Rosenthal were reassuring. Hackbart's reassurance took the form of a statement to Sieger that the tickets were good, that Ticketron would not know that the items were missing from their stock and that I had just picked them up this morning at the airport. They had been flown in from Hagerstown, the printing plant." . Tr. 74.

Folch went on to refer generally to other people that he was going to contact later in the day for the purpose of selling tickets. At one point Folch had indicated his ability to handle 10,000 tickets a week. Sieger expressed disbelief at Folch's ability to handle so large a quantity, stating that the amount of 10,000 tickets was

"ridiculous" and that Folch and Rosenthal "didn't know what they were doing." Hackbart's testimony on direct examination could be read as indicating that Folch expressed this skepticism to Sieger, Tr. 73-74; but on cross-examination of Hackbart it became clear that he could in fact handle blank Ticketron tickets in those quantities. Tr. 93.

The participants then turned to the particular transaction involving Sieger. Folch instructed Hackbart that 2,000 tickets should be turned over to Sieger. Folch reminded Hackbart that he had given Hackbart $1,000 in "good faith" money earlier in the day. That amount would defray the cost of the 2,000 tickets. Hackbart went to the trunk of the car and took out three bundles of 800 tickets each. Hackbart did not wish to break open one of these packages,

since, as noted, supra, only the first and last tickets were valid; all the other tickets in the package were clearly marked "void." So Hackbart gave all three packages to Folch for transmittal to Sieger, remarking: "I will give you another 400, I will give you three packages that total 3400 tickets." Folch expressed his thanks, suggested that he and Hackbart walk to the street corner, and there reached into his wallet and gave Hackbart two $100 bills, saying, "Here, this is for the additional 400 tickets that you gave Sieger." Tr. 75.

At this point Hackbart signalled to the surveilling agents, and told Folch he was under arrest. Folch then ran north, discarding his wallet and an address book as he did so. The wallet was retrieved and is in evidence as GX 11. The address book

listed a telephone number for "Cyclops" under the heading "S."

Sieger's telephone number also appeared opposite the name "Howie" in a booklet that was taken from defendant Brown after the latter's arrest. The entry appears under the date February 1983. The booklet is in evidence as GX 14.

Sieger was also arrested on July 25. Subsequently Agent Sturn took a statement from him. Sturn testified to the substance of Sieger's statement without objection, and I quote the relevant portion's of Sturm's testimony:

> "I advised him that he was arrested and I asked him what happened. He then proceeded to tell me that he had spoken to Mr. Folch approximately a week before, the week before the present date, and was advised by Mr. Folch that Mr. Folch had a way of obtaining blank Ticketron tickets from Ticketron.

"He said he spoke to Mr. Folch several times during the last week and at nine o'clock that morning Mr. Folch came to Mr. Sieger's house and Mr. Sieger gave Mr. Folch $3500. The $3500 was supposed to be used by Folch to purchase blank Ticketron tickets, which were then to be sold to another individual named Tonto later that day. There was supposed to be a $1.50 profit made from the sale of the tickets to Tonto and that $1.50 was supposed to be split by Folch and Sieger. I believe Sieger was going to pay $1.50 for each ticket.

"He then told me that he received a phone call from Folch later that morning, at eleven o'clock, and that Folch advised him that Folch was in possession of the blank Ticketron tickets. He also received a phone call at 11:30 that morning and was advised by Folch that Tonto was not at Blimpy's, which was the place they were supposed to meet. Mr. Sieger advised me he received a phone call at approximately 3:15 p.m. and was advised to meet Mr. Folch downstairs in front of Mr. Sieger's residence. Mr. Sieger went downstairs, met Mr. Folch, another individual named Ray, and another individual named Dale. He stated that they spoke for a little bit, and then Mr. Sieger was given blank Ticketron tickets by Mr. Folch. He then stated that he

> was arrested and he had also advised me he was in the business of scalping tickets. He said that he had not intended to handle the blank tickets that day, since Mr. Folch was to sell them to Tonto that same day.
>
> "He told me that Tonto would most likely have the tickets printed somewhere, have dates, times, numbers and letters printed on them, and sell those blank tickets to scalpers on the street again."
>
> Tr. 135-36.

Expanding further on the proposed purchaser, Sturm said of Sieger:

> "He told me that Tonto was also known to him as Bob Wear or Bob Stevens, and that he is based in Chicago. Mr. Sieger advised me Tonto always calls his associates and he has no telephone number listing for Tonto." Tr. 138.

On cross-examination of Sturm, Sieger's counsel developed that Sieger had told Sturm he had spoken to Folch on 24 occasions during the week preceding these events. Tr. 142, 145.

Defendant Lindsay also gave a post-arrest statement, to FBI special agent Jeffrey Rinek. Rinek described the substance of Lindsay's statement, without objection from Lindsay's counsel. Of course, the statement being post-arrest and consequently not in furtherance of any conspiracy, I consider the statement only against Lindsay, just as Sieger's statement, quoted supra, is admissible only against Sieger.

According to Rinek's testimony:

> "Mr. Lindsay began by stating that he was going to Madison Square Garden to purchase tickets for a David Bowie concert. In the course of the discussion Mr. Lindsay stated that he buys tickets en masse to scalp them and that day when he went to the Garden to buy the tickets they were sold out.
>
> "Afterwards, on his way out of the Garden, he ran into an individual who he said was named Pepper."
>
> Tr. 111-12.

"Pepper," it may parenthetically be noted, is the nickname of defendant Brown. Rinek continued:

> "A. At the point that Mr. Lindsay was unable to purchase the tickets for the David Bowie concert, on his way out of the vicinity of Madison Square Garden, he ran into an acquaintance of his who he said was named Pepper with whom he traded amenities, and then he proceeded on his way to get breakfast at a restaurant on 31st Street, and on the way he encountered someone who he described as a white male who had another person with him.
>
> "The person asked if he would be interested in purchasing blank Ticketron tickets at approximately $2 apiece contained in a packet of 800.
>
> "Mr. Lindsay said that he did not have the funds to purchase that. However, he thought he might be able to find someone who did, and at that time agreed that if Mr. Lindsay could find someone, the finder's fee would be $200.
>
> "Then Mr. Lindsay proceeded back to Madison Square Garden where he reencountered his friend Pepper, described the situation of the offer of the blank Ticketron

tickets and then took Pepper to meet the individual who had made those tickets available for sale.

"At that point they all agreed, they all met--agreed on a meeting time of approximately an hour later to finalize the transaction, and I believe it was 11:45, to the best of my recollection, about an hour after their initial meeting that Mr. Lindsay and Pepper and the two gentlemen previously along with a third gentleman returned to that scene and then proceeded with the transaction for the sale of the Ticketron tickets.

"Then Mr. Lindsay said that he wasn't aware of the actual details of the sale, as he stood off to the side.

"However, at the conclusion of the sale he was given a hundred dollars. He expressed displeasure in that it was supposed to be $200, but nevertheless he accepted $100, and then said upon leaving the area of the transaction was arrested by the FBI."

Tr. 112-14.

Agent Sturm was keeping Hackbart, Folch and Rosenthal under surveillance during all these incidents. At the time of the transaction involving

Lindsay and Brown, he was in a car, moving around in traffic, with his vision consequently obstructed at times. He observed Lindsay and Brown conversing with Hackbart and his companions, but could not see who was handing what to whom, or hear who was saying what to whom. He did not have these individuals under observation at all times. Eventually a time came when he left his car and followed and arrested Brown and Lindsay.

Cross-examination of the investigating agents revealed that, during the time they were plotting with Folch the implementation of the scheme, Folch never mentioned either Brown or Lindsay, so that both Brown and Lindsay were total strangers to the agents when they appeared on the scene on July 25.

On the issue of the value of

the blank tickets, the Government elicited expert testimony from Joseph Rafalowicz, Ticketron's general counsel. Rafalowicz testified that blank Ticketron tickets may be made into counterfeits of popular, sold-out events, and then "scalped" for substantial premiums. Tr. 150-160. I overruled defendant's objection to the relevance of that testimony, and accept it as credible.

Against this factual background, the several defendants make various arguments.

Brown's Belief That the Blank Tickets Were "Stolen, Unlawfully Converted, ot Taken."

Preliminarily, Brown argues that the Government has not proved beyond a reasonable doubt that he believed the Ticketron blanks received from Folch and Hackbart were "stolen, unlawfully converted,

or taken," in the words of 18 U.S.C. §2315. Lindsay does not advance that argument in his brief, but it would appear that if it is sound, it applied to him as well.

Of course, in fact the blank tickets were not stolen from Ticketron, having been supplied by the company in aid of law enforcement efforts. In these circumstances, the Government charges defendants with conspiracy, not the substantive offense. As to conspiracy, the impossibility of committing a substantive offense (because the tickets were not in fact stolen) is immaterial. Brown may be convicted of conspiracy if he agreed with others "to attempt to commit acts which include all the elements of a crime under (section 2315) and any overt act is done pursuant to the agreement." United States v. Rose, 590 F.2d 232, 235 (7th Cir. 1978); see

also United States v. Feola, 420 U.S. 671, 694 (1975). The issue is therefore whether Brown believed the blanks were stolen.

The brief for Brown contends (at 9-10): "If Brown thought the ticket blanks were counterfeits as opposed to stolen, unlawfully converted, or taken, his conduct may have been reprehensible but he would not be guilty of the crime charged." Brown's counsel regards the distinction as critical: "...in the absence of any...proof that Brown believed the blanks were stolen, or unlawfully converted, as opposed to counterfeit, there is a reasonable doubt as to that element and he must be acquitted." Id. at 14.

The Government contends that it proved Brown's belief that the tickets were stolen, relying in significant part on Hackbart's account of his post-sale

conversation with Brown (quoted at pp. 7-8, supra). But assuming arguendo that the proof fails to support the finding, Brown is entitled to acquittal only if the distinction between counterfeit and stolen tickets is legally significant. For I have no hesitation in finding that Brown knew the blank tickets he purchased were either counterfeit or stolen.

The defense fails because the distinction has no significance. Assume Brown only believed the tickets to be counterfeit. The very act of counterfeiting would constitute a theft of Ticketron's marketing concept and implementation: in short, a theft of commercial property. The conspirators' purpose was to steal Ticketron's property (in that functional sense) and sell it to an unsuspecting public. It matters not whether Brown believed that the blanks he

purchased were genuine or stolen, or counterfeit; Ticketron is the victim of theft in either case.

Judge Friendly's analysis in United States v. Bottone, 365 F.2d 389 (2nd Cir.), cert. denied, 385 U.S. 974 (1966), is instructive. Defendants stole commercial documents, copied them, returned the originals, and transported the copies in interstate commerce. They were prosecuted under 18 U.S.C. §2314, which prohibits the transportation of "goods" known to have been "stolen." Defendants argued that their acts did not fall within the statute because they transported "counterfeit," not "stolen" documents. Judge Friendly made short shrift of the argument:

> "...when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible

> object never possessed by the original owner should be deemed immaterial."
>
> 365 F.2d at 393-94.

He continued:

> "We have been instructed to 'free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule.' United States v. Dege, 364 U.S. 51, 52, 80 S.Ct. 1589, 1590, 4 L.Ed.2d 1563 (1960) (Frankfurter, J.), quoting United States v. Union Supply Co., 215 U.S. 50, 55, 30 S.Ct. 15, 54 L.Ed. 87 (1909) (Holmes, J.). See also United States v. Sullivan, 332 U.S. 689, 693-694, 68 S.Ct. 331, 92 L.ed. 297 (1948); United States v. Bramblett, 348 U.S. 503, 509-510, 75 S.Ct. 504, 99 L.Ed. 594 (1955); United States v. Turley, 352 U.S. 407, 412-413, 77 S.Ct. 396, 1 L.Ed.2d 430 (1957). Such considerations have particular force when, as here, the defendants could not have doubted the criminal nature of their conduct, and the sole issue is whether they subjected themselves to punishment by the United States as well as by a state."
>
> Id. at 394.

See also United States v. Sam Goody, Inc., 506 F. Supp. 380, 388-89 (E.D.N.Y. 1981) and cases cited.

The analysis in Bottone is fully applicable here. Accordingly Brown's defense based upon the distinction between counterfeit and stolen tickets fails; and I need not pass upon the creidibility of Hackbart's testimony, which Brown vigorously attacks. But if it were necessary to a decision, I would not reject that testimony as unworthy of belief.

Single Conspiracy versus Multiple Conspiracies

As noted, the one-court indictment charged a conspiracy involving five individuals. Brown and Lindsay contend that, at most, they were members of a separate and limited conspiracy

involving one bundle of 800 tickets. They must be acquitted, it is argued, because of the Government's failure to prove against them the conspiracy alleged in the indictment.

Defendants' factual premise is correct. This is a "wheel" conspiracy, "without the rim of the wheel to enclose the spokes." Kotteakos v. United States, 328 U.S. 750, 755 (1946). Folch was at the center of the wheel. He intended to sell Ticketron blanks to a number of purchasers. Bill Wear, a/k/a "Tonto," the spoke from the West, was one. He did not materialize. Zabare was another, and Sieger a third. When Wear did not materialize on July 25, 1983, Folch found, fortuitously and at random, Brown and Lindsay to form another spoke. The sale by Folch and Hackbart to Brown and Lindsay was "casual" and "spasmodic";

these defendants were involved only in that single sale. Cf. United States v. Cambindo Valencia, 609 F.2d 603, 624 (2nd Cir. 1979). There is no evidence that Brown or Lindsay knew anything of the other potential purchasers, or that these potential purchasers knew anything of Brown and Lindsay. As the evidence shows, Brown and Lindsay were simply plucked off the street to furnish substitute business after Wear failed to appear.

Because of this total absence of connection between Brown and Lindsay on the one hand and the other purchasers on the other, I conclude that, as in Kotteakos, there is no rim of the wheel enclosing these particular spokes.

In arguing for the existance of the requisite rim of a single conspiracy, the Government relies upon

Blumenthal v. United States, 332 U.S. 539 (1947), and its progeny such as United States v. Manarite, 448 F.2d 583 (2nd Cir. 1971). Manarite summarizes the pertinent principles:

> "Alexander argues that even if on two isolated occasions he may have committed substantive violations of §1645, there is no proof that he was involved in a conspiracy to violate that section, or at least he was not proved to be part of the conspiracy charged. We do not agree. The conspiracy here shown was of the type sometimes referred to as a 'wheel conspiracy' in that members of a 'core' group deal with a number of contacts who are analogized with each other only through the core conspirators. In such conspiracies, whether the spoke participants may be found to be members along with the core conspirators depends on whether or not the 'spokes' knew or had reason to know of the existence, but not necessarily the identity, of one or more of the other spoke participants in the wheel conspiracy. Compare United States v. Kotteakos, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) with Blumenthal v. United States, 332 U.S. 539, 559, 68 S.Ct. 248, 92 L.Ed. 154 (1947)."
>
> 448 F.2d at 589-590 (footnote omitted)

In both Blumenthal and Manarite, there was substantial evidence from which the finders of fact could infer that the "spokes" knew or had reason to know of the existence of other spokes active in the same conspiracy. That evidence in Blumenthal, involving a conspiracy to dispose of two carloads (or 4,000 cases) of whiskey at over the ceiling wholesale price, is set forth in the Court's lengthy footnote at 332 U.S. n. 14. I need not recount that evidence in full. It is sufficient to say that the evidence, both direct and circumstantial, was sufficiently particularized to permit the inference that all defendants "were aware that their individual sales were part of a larger common enterprise, dependent on the carefully evolved arrangements to give the sales the guise of legitimacy, to dispose of a larger

store of liquor." Id. at 555 n. 14. The Court stressed in text "the special circumstances of this case," distinguishing Kotteakos on the grounds that "(t)he scheme was in fact the same scheme" and that "the salesmen knew or must have known that others unknown to them were sharing in so large a project...." 332 U.S. at 557-58.

In Manarite, the defendants were convicted of a conspiracy to transport obscene material in interstate commerce for the purpose of sale or distribution. One defendant, a Minneapolis dealer named Alexander who purchased material from the "core" group in New York, appealed his conviction on the ground that he was not a member of the single conspiracy alleged in the indictment. The evidence showed that Alexander came to New York from Minneapolis and ordered large quantities of

pornographic materials: 10,000 copies of a pornographic magazine in February of 1969; an additional 10,000 copies in March and April. In April, Alexander also returned to one of the couriers about 1,000 pornographic films with which he was dissatisfied. 448 F.2d at 588. On this evidence, the Second Circuit reasoned:

> "On this record it is obvious that Alexander must have known that this material which was delivered to him in quantities of 10,000 copies at a time was also being distributed to other dealers. He visited Portela (one of the core group) in New York and must have been aware of the nature and extent of the conspiracy and its operation."
>
> Id. at 590.

To convict Brown and Lindsay as members of the single conspiracy alleged in the indictment, the Government was obliged to prove beyond a reasonable doubt that Lindsay and Brown had knowledge

of the far-reaching, overall scheme of which Folch and Sieger (and Hackbart in his undercover capacity) formed the center core. United States v. Bertolotti, 529 F.2d 149, 155 (2nd Cir, 1975). The Government, relying primarily upon Hackbart's reassurances to Brown (p. 7, supra), as well as on the mechanics of the same, argues that Brown and Lindsay must have believed that they were dealing with a "wheeler-dealer" with "insider" access to "huge quantities of stolen Ticketron tickets," from which the additional knowledge should be inferred that "others unknown to them were sharing in so large a project." Government reply brief at 6, quoting Blumenthal, supra. I cannot agree. The evidence is too frail to sustain the burden of inference placed upon it. It would have been equally plausible for

Lindsay and Brown to infer that Folch and Hackbart had come into possession of the bundle of blanks from other sources, and were turning it over for a quick profit in the context of a single transaction. There is a surface plausibility to the Government's argument, but it bears the burden of proof beyond a reasonable doubt on the issue, and that burden has not been sustained. Proof beyond a reasonable doubt in this case establishes no more than the presence of Folch, Sieger and Hackbart as a common factor in the discrete, separate sales revealed by the evidence. That is not sufficient to link all purchasers in a single overall conspiracy. United States v. Bertolotti, supra.

I do not find the drug conspiracy "chain" cases, upon which the Government also relies in its supplemental

letter brief (at 4), as particularly helpful in the context of this case.

Lindsay and Brown were charged with being members of a single conspiracy. If the proof disclosed multiple conspiracies, "the error of variance has been committed." United States v. Bertolotti, supra, at 154 (citing cases). If Brown and Lindsay have been proved to be criminal conspirators, the conspiracy is a separate one, entered into with Folch on the sidewalk in front of Blimpie's. In these circumstances, I must now consider the effect of the variance of proof upon the question of whether Lindsay and Brown should be convicted or acquitted, in this bench trial, of the single conspiracy charged in the indictment. That is a quastion upon which I

requested additional post-trial briefs of counsel.

Th. question arises because "(w)here the indictment charges one conspiracy but the proof shows more than one, a variance is not necessarily fatal." United States v. Miley, 513 F.2d 1191, 1207 (2nd Cir.), cert. denied, 423 U.S. 842 (1975). Miley quotes Berger v. United States, 295 U.S. 78, 82 (1935) for the proposition that "(t)he true inquiry...is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." Thus in United States v. Cambindo Valencia, supra, 609 F.2d at 625, the Second Circuit observed: "When we have found a variance between the single conspiracy charged and several that have been proved at trial, we have reversed

convictions only when there was a showing of substantial prejudice." An example of the prejudice that may result is given in Miley, supra, at 1208:

> "While the briefs and arguments contain many conclusory statements about the prejudice suffered by appellants, particularly with respect to the alleged admission of hearsay statements by persons in a separate conspiracy, neither our inquiries from the bench nor our examination of the transcript have disclosed any hearsay emanating from a memver of one of the conspiracies that was used to the detriment of a member of another."

Kotteakos, supra, the favorite case of defense counsel in this area, in fact turns upon the court's refusal to assume that the jury was not misled by the trial court's instruactions. This discussion appears at 328 U.S. 768-769:

> "The trial court was on the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was

possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans.

"This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several , though similar, purposes of numerous separate adventures of like character. It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been; and came to the conclusion that the petitioners were guilty only of the separate conspiracies in which the proof shows they respectively participated. But, in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference." (emphasis added).

In the case at bar, there are no "lay triers of fact." I have found the facts, and stated them specially pursuant to Rule 23(c), F.R.Crim.P.

Presumably, I am "well informed upon the law." Arguably, this discussion in Kotteakos and the subsequent Second Circuit cases stressing the importance of prejudice would indicate that where the facts are found by a judge, and not by lay jurors, single versus multiple conspiracies simply do not present a problem, and the judge is free to convict defendants "of the separate conspiracies in which the proof shows they respectively participated." Kotteakos at 769.

The argument on the other side is that the trial judge, as finder of the facts, is bound by the letter of those instructions which the Second Circuit has held must be given to jurors in cases where the question arises and the jury has not been waived. On that score, the Second Circuit wrote in Cambindo Valencia, supra, at 625:

> "In order to promote the goal of 'keeping distinct conspiracies distinct,' Kotteakos, supra, 328 U.S. at 770, 66 S.Ct. 1239, the court should describe explicitly the possibility of several conspiracies and instruct the jury that in order to convict a given defendant, it must'"find that he was a member of the conspiracy charged in the indictment and not some other conspiracy."' Tramunti, supra, 513 F.2d at 1107; see Taylor, supra, 562 F.2d at 1351 ('The charge here correctly told the jurors that they had to acquit unless they found the existence of the conspiracy charged in the indictment and found that each defendant they convicted was a member of that conspiracy.')." (emphasis added).

If those instructions are taken at face value in the case at bar, then on the basis of my prior findings Lindsay and Brown should be acquitted.

Having posed the question and suggested the opposing arguments--which the parties urge in their supplemental briefs--I conclude that the variance in proof is no bar to conviction in the case at bar.

Primarily that is because the variance poses no threat of prejudice to a defendant in a bench trial. The prejudicial effect of the variance upon a jury lies at the core of concern in the single-versus-multiple conspiracy cases, beginning with Kotteakos. I mean no disrespect of our citizen jurors when I conclude that judges, trained in the law, are not as prone to spillover effect or confusion if the indictment charges a single conspiracy and more than one are provided.

Defendants argue in their supplemental brief that United States v. Cambindo Valencia, supra, requires acquittal because the Second Circuit, following conviction by a jury, directed dismissal of the indictment as to the three defendants where "there was no evidence linking (them) to the conspiracy charge in the indictment."

Letter brief at 2. The argument continues:

> "If the issue in Cambindo Valencia had been merely prejudicial or spillover because many defendants were tried together, then the convictions of the final three defendants would not have been reversed outright with proscription against a retrial under that indictment.
>
> "It is our contention that the defendants in our case are equivalent to this last group of defendants in Cambindo Valencia, and as to them the indictment should be dismissed as a matter of law. If, however, there was enough evidence to raise a question of fact for the factfinder, the Court must, in effect, give itself the Tramunti charge and acquit."

Id. at 3.

The Cambindo Valencia court held that "a multiple conspiracy charge is required whenever several conspiracies might be inferred from the evidence offered," 609 F.2d at 625. The trial court had not given the charge. A multiple conspiracy was necessary, the

Second Circuit continued, where twenty-seven defendants were charged in a single conspiracy to import cocaine from Colombia over a period of almost five years; and the Court of Appeals could "identify only one discrete conspiracy, an enterprise organized around appellant Cambindo; that was clearly enough established by the evidence to avoid the prejudicial effects resulting from this massive trial." Id. at 606-06, 626. Those defendants who clearly participated in that conspiracy had their convictions affirmed. As to defendants where the evidence of participation "was not of the same conclusive nature," the court reversed the convictions but permitted retrial on the same indictment, under proper instructions. 609 F.2d at 628. The defendants to whom Brown and Linday analogize themselves were dealt with thus:

> "Appellants Escobar, Mario Caicedo, and Velasco may not, however be retried under this indictment and their convictions are reversed. The Government has failed to offer any evidence linking them to the Cambindo conspiracy, and it would be improper to allow a retrial without the bringing of a new indictment that would identify the specific conspiracies charges against these defendants."
>
> Ibid.

I do not see that these concerns of prejudice in a "massive" conspiracy jury trial, involving many defendants and illicit acts extending over several years, are particularly instructive on the issue of prejudice where a judge tries a case involving four defendants and events requiring only several days to accomplish. My conclusion is that, in the circumstances of the case at bar, the variance in proof did not prejudice Brown or Lindsay, and accordingly does not require a judgment of acquittal.

United States v. Dietrich, C.C., 126 F. 664 (Van Devanter and Munger, JJ.); United States v. New York Central & H.R.R. Co., C.C., 146 F. 298 (Holt, D.J.); United States v. Sager, 2 Cir., 49 F.2d 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. United States v. Katz, 271 U.S. 354, 355, 46 S.Ct., 513, 70 L.Ed. 986; Gebardi v. United States, 287 U.S. 112, 122, 53 S.Ct. 35, 77 L.Ed. 206, 84 A.L.R. 370. Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of the substantive crime, neither was guilty of conspiracy. The indictment was not so confined; it laid a single conspiracy which comprehended not only the disposal of the books but the original theft of them. Such a conspiracy was not within the doctrine we have just mentioned, for it covered more than the crime of receiving. The difficulty was not therefore in the indictment but in the proof, for the presecution did not connect Zeuli with the preliminary theft, or with the books at all until after they had been stolen, and at a time when nothing more remained to be done but to dispose of them."

137 F.2d at 846-47.

The Second Circuit reached a comparable conclusion in United States v. Aviles, 274 F.2d 179 (2nd Cir. 1960), where seventeen defendants stood trial on a charge of conspiracy to import and smuggle narcotics into the United States, and to receive, sell and distribute them following importation. The proof as to one defendant, Rodriguez, showed no more than on one occasion Rodriguez purchased narcotics from one of the conspirators, one Cantellops. The Second Circuit reversed Rodriquez's conviction for conspiracy and dismissed the indictment as to him:

> "Rodriguez was not a regular customer of Cantellops, so far as appears from the evidence. We may assume that Rodriguez knew that the narcotics were illegally imported, but there is insufficient basis in the evidence for assuming that he knew that Cantellops was an agent for an existing conspiracy. So far as appears, Rodriguez had no knowledge whatever as to how Cantellops

came into possession of the drugs.

> "The single purchase alone was not enough to prove that Rodriquez was a participant in the conspiracy. It was necessary to the government's case to submit evidence that Rodriquez knew of the conspiracy and associated himself with it. United States v. Reina, 2 Cir., 242 F.2d 302, certiori denied, 1957, 354 U.S. 913, 77 S.Ct. 1294, 1 L.Ed.2d 1427; United States v. Koch, 2 Cir., 1940, 113 F.2d 982; United States v. Peoni, 2 Cir., 1938, 100 F.2d 401. From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it, but there was no such evidence of knowledge here. Nor was there evidence of a continuous course of dealing between Rodriguez and Cantellops, which might warrant the inference that Rodriguez had some knowledge of the character of the source from which his narcotics came."
>
> 274 F.2d at 190.

Although distinguishing Zeuli on the facts, the Second Circuit in United States v. Kahan, 572 F.2d 923, 935 (2nd Cir. 1978), recognized that case's continuing vitality when it wrote:

> "The case is not one in which a single sale of goods known to be stolen is charged as a conspiracy between seller and buyer, as in United States v. Zeuli, 2nd Cir. 1943, 137 F.2d 845, which itself recognized that the 'doctrine' is confined to the instance where the indictment charges or the proof shows no more than the sale transaction. More was charged here, and the evidence presented to the jury was not simply evidence of knowing receipt of stolen property."

The principle underlying these cases is that seller and purchaser in a single transaction have no joint interest, of the sort required by the crime of conspiracy. The seller's interest is to sell; the purchaser's is to buy. The Second Circuit articulated that principle in United States v. Koch, 113 F.2d 982, 983 (2nd Cir. 1940):

> "The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest.

> The appellant brought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators. Dickerson v. United States, 8 Cir., 18 F.2d 887. It was necessary to the government's case to show that the appellant was in some way knowingly associated in the unlawful common enterprise to import the drugs and dispose of them unlawfully. United States v. Peoni, 2 Cir., 100 F.2d 401; Muyres v. United States, 9 Cir., 89 F.2d 784."

For comparable authority outside the Second Circuit, see United States v. Braico, 422 F.2d 543 (7th Cir.), cert. denied, 398 U.S. 912 (1970); United States v. Verelli, 407 F.2d 735 (7th Cir. 1979), cert. denied sub nom. Saletko v. United States. 405 U.S. 1040 (1972); United States v. Ford, 324 F.2d 950, 952-53 (7th Cir. 1963) (citing Zeuli and Koch, supra); United States v. Cook, 461 F.2d 906, 910 n.3 (5th Cir. 1972).

I recognize that the indictment in Zeuli was more broadly drawn; "it laid a single conspiracy which comprehended not only the disposal of the books but the original theft of them" 137 F.2d at 846. Similarly, in Aviles the conspiracy charge included the importation, possession and distribution of narcotics. In the case at bar, the superseding indictment charges only a conspiracy to violate 18 U.S.C. S2315, which is in turn limited to the receipt and sale of stolen goods. But I do not think that distinction takes the present case outside the rule of these cases. The basic principle is that conspirators must agree together to further a common intent or scheme. A single-transaction buyer, whose knowledge and participation are limited to that single transaction, may have committed a substantive offense, but he cannot in law be

guilty of conspiracy. That result is not changed by the fact that Brown and Lindsay acted together as buyers in the single purchase transaction. United States v. Braico, supra. [1]

The Government's difficulty is that it could not prove the substantive offense in the case at bar, since the Ticketron blanks were not in fact stolen. Accordingly the indictment was superseded to charge all defendants with conspiracy. As to defendants Brown and Lindsay, the crime of conspiracy has not been established, for the reasons stated. Accordingly, judgments of acquittal will be entered in favor of Brown and Lindsay.[2]

The Case for Defendant Sieger

Unlike Brown and Lindsay, Sieger was not merely a participant in a single,

isolated transaction. The evidence makes it clear that he had a long-standing relationship with Folch; that he participated in conversations over time concerning the scope of the conspiracy; and that he closely followed developments, as evidenced by his knowledge of the arrest of Brown and Lindsay earlier in the day, and his expressed concern about those arrests.

Therefore a number of the arguments available to Brown and Lindsay are not available to Sieger. He does argue, however, that he is entitled to acquittal because the blank tickets were not, in fact, "stolen."

Sieger approaches this proposition in a somewhat different fashion than did Brown and Lindsay, and relies upon different authority, at least in part. But the argument is essentially

the same; and much of the reasoning rejecting the comparable contention of Brown and Lindsay (pp. 16-19, supra) is applicable here. I will add only that in United States v. Giordano, 693 F.2d 245 (2nd Cir. 1982), the Second Circuit again reiterated that "conspiracy is a crime separate and apart from the substantive offense that is the object of the conspiracy"; that the illegality of the conspiratorial agreement "does not depend upon the achievement of its goal," nor does it matter "that the ends of the conspiracy were from the beginning unattainable." In the light of these principles, the Giordano court continued:

> "...federal jurisdiction does not depend on proof that the objective of the conspiracy has been, or could have been, achieved. Jurisdiction is established by proof that the accused planned to commit a substantive offense which, if attainable, would have

> violated a federal statute, and that at least one overt act has been committed in furtherance of the conspiracy. The key, as the Court stated in Feola, supra, is whether facts exist 'tying the proscribed conduct to the area of federal concern delineated by the statute,' 420 U.S. at 695, 95 S.Ct. at 1969. If so, then the agreement to commit a crime, although not carried out, is a crime that can be prosecuted in the federal courts."
>
> 693 F.2d at 249.

In the case at bar, section 2315 reflects federal concern with the receipt of and further trafficking in stolen goods. The substantive offense was not "attainable" only because Ticketron, cooperating with law enforcement officers, had made its blank tickets available to them; thus the tickets were not "stolen." But that fact, unknown to Sieger and beyond his contemplation, avails him nothing. It is clear that, in Giordano's phrass, Sieger planned with Folch "to

commit a substantive offense which, if attainable, would have violated a federal statute...." That is sufficient to convict of the crime of conspiracy. Sieger attempts to distinguish Giordano in his brief, but I am not persuaded by the effort.

Secondly, Sieger argues in the case by causing improperly created federal jurisdiction in the case by causing the transportation, in interstate commerce, of the blank tickets from Maryland to New Jersey and, thereafter, New York. I am asked to dismiss the indictment on the authority of United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

In Archer the Second Circuit dismissed substantive and conspiracy charges arising out of the Interstate Travel in Aid of Racketeering statute ('the Travel Act"), 18 U.S.C. §1952,

which makes it a crime to use "any facility in interstate...commerce...to promote... any unlawful activity." The prosecution was of corruption within the Queens County district attorney's office. It appeared that of the three interstate telephone calls on which federal jurisdiction was premised, two had been made by a Government agent for the purpose of manufacturing federal jurisdiction, and the third was made by defendant in a futile attempt to contact that agent. The Second Circuit, in an opinion by Judge Friendly, analyzed the congressional purpose in passing the Travel Act, and concluded that such purposes "certainly did not intend to include a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime." 486 F.2d at 681. The statute was not meant to

include, the court continued, "cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present." Id. at 682. Thus the Archer court's primary concern was the perceived misconduct of Government agents: "Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings." Ibid.

The decision in Archer was clarified on rehearing. The Government urged that on one of the calls, the agent was out of state "on legitimate business and was not sent there solely to manufacture jurisdiction" in the case. 486 F.2d at 685. Accepting that to be so, the court did not regard it as sufficient to establish federal jurisdiction. "Any such holding would permit the Government to convert any local bribery it had provoked into a federal offense by

furnishing an out-of-state address for an undercover agent or sending him out-of-state on a legitimate errand and having a call made before the offense was consummated." Ibid. Concluding its opinion on rehearing, the Archer court made it clear that it was not announcing a per se rule of no federal jurisdiction when the jurisdictional element is furnished by the conduct of federal agents. The court stated:

> "While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future."
>
> 486 F.2d at 686-86.

Subsequent defendants have sought to summon Archer to their aid, but the Second Circuit continues to construe the holding narrowly, United States v. Lau Tung Lam, 714 F.2d 209, 210-11 (2nd Cir.), cert. denied, 104 S.Ct. 359 (1983); United States v. Romano, 706 F.2d, 373-74 (2nd Cir. 1983); United States v. Giordano, supra, 693 F.2d at 250-51. The discussion of Archer in Lau Tung Lam is instructive:

> "The carefully limited holding in United States v. Archer, supra, is of no aid to appellant in this case. In Archer, a conviction under the so-called 'Travel Act,' 18 U.S.C. §1952 (1976), was reversed because 'the use of interstate and foreign telephone facilities...did not suffice to bring the defendants within' the Act. 486 F.2d at 683 (denying petition for rehearing). The deficiency arose from the fact that the three calls relied upon by the prosecution were 'from or to a federal agent.' Id. at 684. The decision, as clarified on petition for rehearing, questioned, but stopped short of deciding, whether telephone calls by a federal agent could ever supply the jurisdictional

> element required by the Travel Act. The Court 'left open the possibility' that such calls 'might suffice when sufficiently pervasive or functional' and limited the holding to 'the narrow basis that these conditions were not here fulfilled.' Id."
>
> 714 F.2d at 210.

And in Giordano, the Second Circuit, distinguishing Archer, said this:

> "It may sometimes happen that government activity creates so much of a crime that a federal court sould on due process grounds void a conviction, as we suggested in Archer, 486 F.2d at 676-77. But this is not even close to being that sort of a case; defendants were apparently eager to commit the substantive crime, and the government's use of fictitious premises was based on a legitimate concern for the safety of a bona fide business that the agent originally had in mind."
>
> 693 F.2d at 250-51.

Archer bears no meaningful resemblance to the case at bar. Interstate commerce was not "manufactured" by federal agents in order to create

federal jurisdiction over an exclusively local crime. All Ticketron blank tickets are printed in Hagerstown, Maryland. Interstate commerce was inevitably implicated in any illicit trafficking in Ticketron tickets in other states (such as New York). I recognize that, in the case at bar, federal agents asked that Ticketron send from Hagerstown the particular shipment of blank tickets thereafter offered to Folch and Sieger; but I see nothing reprehensible in that request, particularly since the undercover agents had previously been requested by Folch to obtain a sizable quantity of blank tickets for illicit purposes. In those circumstances, and in Giordano's phrases, the agents, confronted by a wrongdoer, "apparently eager to commit the substantive crime," availed themselves of a strategem "based on a legitimate

concern for the safety of a bona fide business...." 693 F.2d at 250. Their doing so does not entitle Sieger to avoid conviction on due process grounds.

CONCLUSION

The Clerk of the Court is directed to enter judgment of acquittal as to defendants Brown and Lindsay, and judgment of conviction as to defendant Sieger.

Brown and Lindsay are released from the terms and conditions of their bail. The bail shall be marked exonerated.

The Court will require a pre-trial sentence report in respect of defendant Sieger. He will be sentenced on June 6, 1985 at 4:30 p.m. in Courtroom 312.

It is SO ORDERED.

Dated: New York, New York
April 19, 1985

(signed)

CHARLES S. HAIGHT, JR.
U.S.D.J.

FOOTNOTES

1. The Government culls from other Second Circuit cases other statements which it says support a conviction of Brown and Lindsay for conspiracy. United States v. Cardillo, 316 F.2d 614 (2nd Cir. 1963) ("anyone who purchases the goods from one in the conspiracy knowing that they were stolen and transported in interstate commerce becomes part of the conspiracy"); United States v. DeNoia, 451 F.2d 979, 981 (wnd Cir. 1971) (even a single act may draw an actor into the ambit of conspiracy, if the "defendant in question had some knowledge of the broader conspiracy"). As for the quotation from DeNoia, the Government has not in the case at bar proved the requisite additional knowledge beyond reasonable dount. Whatever the import of the quotation from Cardillo in the context of that case, it is not sufficient to deflect the clear thrust of authority derived from the cases cited in text.

2. This decision makes it unnecessary to reach Brown's and Lindsay's last point, which is that, as to them, the Government failed to prove the jurisdictional $5000 value amount contained in section 2315.

On a charge of conspiracy, the Government need not prove that the stolen goods had an actual value of $5000. Proof "of the comspirators' belief that the robbery would yield more than the jurisdictional amount is all that is necessary to sustain a conspiracy conviction." United States v. Tombrello, 666 F.2d 485, 489 (11th Cir.

1982) (citing cases). In the case at bar, proof of belief is essential, since all but two of the blank tickets in the bundle sold to Brown and Lindsay were so vividly stamped "VOID" that they could not be processed as counterfeits; in those circumstances an actual value of $5000 has not been shown. As in all issues concerning state of mind, the defendants' belief of value may be established by circumstantial evidence.

Brown paid Folch $400 for 800 blank tickets. That 50¢ per ticket price governed the other sales revealed by the evidence. But the sales price is not determinative of the "street value," or "value in a thieves' market," of blank Ticketron tickets, United States v. Tyers, 487 F.2d 828, 831 (2nd Cir. 1973); United States v. Bottone, supra, at 393; resale value is pertinent to the inquiry, Bottone at 393; and the jurisdictional amount may be established by additional procedures (such as counterfeiting) necessary to enhance the documents for resale. "It is not essential that the stolen property be worth $100 at the moment of receipt; it is enough if there is evidence that the property had that value at some time when there occurred an offense defined in the statute, charged in the indictment, and proved by the evidence." Kramer, supra, at 921 (theft of blank money orders). The testimony of Rafalowicz concerning the resale value of counterfeit Ticketron tickets is sufficient to prove a total anticipated value of 800 blanks well in excess of $5000. The more difficult point is whether the Government was also obliged to prove, and failed to prove, that Brown and Lindsay personally possessed "the equipment to make the (blank

tickets) negotiable," Tyers, supra, at 831.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the Cityof New York, on the 13th day of March, one thousand nine hundred and eighty-six.

PRESENT:

Hon. James L. Oakes,
Hon. Ralph K. Winter
Hon. George C. Pratt,
Circuit Judges.

United Sates of America,

Appellee,

v. 85-1354

Howard Sieger,

Defendant-Appellant.

O R D E R

Howard Sieger appeals from a judgment of conviction entered on April 19, 1985, after a two-day bench trial before Charles S. Haight , Judge, in the United States District Court for the Southern

District of New York. We affirm.

Sieger was convicted under 18 U.S.C. §371 (1982) of conspiracy to receive stolen property in violation of 18 U.S.C. §2315 (1982). The charge in this case arose out of a scheme whereby a co-defendant of Sieger's purchased blank Ticketron tickets from someone he thought was a corrupt Ticketron employee (actually an FBI agent). Sieger received 2400 such tickets. The tickets were obtained by Ticketron from its Maryland ticket manufacturer, who supplied blank tickets in sealed packets; all but the visible, top- and bottom-most tickets were "test tickets," marked "void" and unusable as counterfeit tickets.

Sieger's first claim is that he cannot be guilty of conspiracy to receive stolen property when the goods in question were not actually stolen. He

relies for this claim on United States v. Feola, 420 U.S. 671, 686 (1975), which states that "to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." Since 18 U.S.C. §2315 requires knowledgethat the goods received were stolen, Seiger argues that he could never have had the requisite mens rea to be guilty either of the substantive offense or of conspiracy to commit the substantive offense. However, this court has rejected claims that a defendant cannot be liable for conspiracy where he could not have committed the substantive offense. E.g., United States v. Giordano, 693 F.2d 245, 249 (2d Cir. 1982) (upholding conviction for conspiracy to commit arson of a piano store where the particular

store did not in fact exist.) See also, United States v. Rose, 590 F.2d 232, 235 (7th Cir. 1978) (allowing conviction of conspiracy to transport stolen goods under 18 U.S.C. § 2314 where the goods were not stolen; section 2314 contains a knowledge requirement), cert. denied, 442 U.S. 929 (1979).

Appellant also claims that under United States v. Archer, 486 F.2d 670 (wnd Cir. 1973), his conviction cannot stand because the agents needlessly generated federal jurisdiction in this case by having the tickets shipped to New York from Maryland. Archer held that a bribery, totally local in character, could not be made into a violation of the Travel Act solely through interstate telephone calls to or from government agents when the location of the calls had nothing to do

with the object of the conspiracy and where the agents either made the calls or encouraged the defendants to do so needlessly. Here, by contrast, the sole manufacturer of Ticketron tickets was in Maryland. A scheme to obtain the tickets from the manufacturer by its nature involved interestate commerce. Consequently, Archer does not require reversal.

Judgment affirmed.

(signed)
JAMES L. OAKES

(signed)
RALPH K. WINTER

(signed)
GEORGE C. PRATT,
Circuit Judges.

N.B.: Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.